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No. 91-145

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

RICHARD JOHN CHARD III,
Petitioner,
vs.

THE STATE OF COLORADO,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Colorado Supreme Court
Case No. 89SC547

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QUESTIONS PRESENTED

1. Whether petitioner was unfairly surprised by the application of a rule of law which already existed in other jurisdictions and which was plainly foreshadowed by closely analogous caselaw in the state of Colorado itself?

2. Whether the federal constitution requires that a 7 year old sexual assault victim forfeit her privacy interests in avoiding involuntary psychological and physical examinations, because a criminal defendant speculates that the examinations might uncover something useful to his defense?

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STATEMENT OF THE CASE/STATEMENT OF FACTS

Petitioner Richard John Chard III (hereafter "Chard") was convicted in November 1987 of five counts of aggravated incest and sentenced to 14 years imprisonment (cl. v. pp. 150-54, 171), based on the testimony of: his 7 year old daughter, Risa, who related at trial that he had subjected her to penile penetration of the vagina and anus a number of times while she was visiting him in Colorado during the summer of 1986 (v. 4, pp. 385, 387, 388-90, 393-96, 402-03, 406); California pediatrician Valerie Young, who opined (based on finding an abnormally deep vaginal area and scarring in certain portions of the vagina, an unusually loose and dilating rectum, the child's state of depression, and the ease with which the child went into the uncomfortable

legs-apart examination position) that Risa had been subjected to recurrent, long-term object or penile penetration of the vagina and rectum (v. 3, pp. 226, 230-46, 253, 265, 278); and, social worker Suzanne Long[1], who related Risa's out-of-court descriptions of Chard's sexual activity with her, Risa's continuing nightmares and ambivalence toward Chard, and Risa's consistent identification of him, rather than her stepfather, as her assailant (v. 3, pp. 283-86, 290, 307-08, 310, 313-14, 318-19, 323-24, 326-31, 356).

Prior to trial, Chard requested that the child be subjected to further examinations, citing, as reasons, the fact that she had not been examined until nearly six months after she returned from Colorado[2] and the possibility that his ex-wife might be exercising undue influence over her. At a July 21, 1987 hearing, however, he testified that Risa was "sharp as a tack" (v. 1, p. 62); that she understood the difference between the truth and a lie; and, that she was not a chronic liar (v. 1, p. 62). His expert, Dr. David Wilkinson,

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[1]Ms. Long was not simply a "child protection advocate" (*see* pet. cert. at 7). She had extensive education, training, and experience in marriage, family, and counseling matters (v. 3, pp. 282-89); she co-authored a book on the assessment and treatment of child sexual abuse victims (v. 3, pp. 286-87), and testified as an expert on such matters (*id.*); she had been employed by the Orange County (California) Family Services Association and had a private practice of her own (v. 3, p. 284). Her practice did not involve only clients who were child victims of sexual assault -- she also examined and worked with alleged perpetrators of child sexual assaults (v. 3, pp. 287-88). Only half her clients were children (v. 3, p. 287).

[2]Chard's ex-wife, Sarah Sansevieri, had discovered substantial injury to the child's vagina when the child returned home to California in September 1986 (v. 4, p. 451) but had been reluctant to take the child to a doctor because she did not think that Chard would have harmed the child (v. 4, pp. 453-54, v. 5, p. 598). Upon the advice of her attorney, she did take Risa to see Young and Long in February and March 1987 (v. 5, p. 598, Defendant's Exhibit G at 1).

testified that Dr. Young had been very "thorough" and "complete" in examining Risa (v. 1, pp. 21-22, 35-36)[3]. The one potential benefit of another physical examination[4], he said, "would be to determine if there were ongoing problems" (v. 1, pp. 15, 35): it "**may** answer some questions as to whether something's ongoing currently" (v. 1, p. 15) (emphasis added). He noted, however, that it is "not an easy answer" to say whether another examination would be painful to Risa (v. 1, pp. 35-36): the examination was "frightening to children, they perceive it as physically painful, and to some extent it can be" (v. 1, p. 20); "sexual examinations in young children are generally considered to be traumatic" (v. 1, pp. 30-31); a child could be experiencing emotional trauma without crying or screaming during an examination (v. 1, pp. 31-32); and, he would "have to know the child and what her emotional disposition is before [he] could accurately" balance her emotional/psychological trauma against the

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[3]Dr. Wilkinson found it significant that Risa had appeared somewhat comfortable during Dr. Young's examination: "typically in long-term abuse cases the patient acquiesces more easily" (v. 1, p. 20).

[4]A procedure called a colposcopy could be used to look intravaginally at the child's uterus and cervix (v. 1, pp. 10, 18) and rectal patulousness (looseness) could be assessed by measuring the size of the rectal opening and by probing a finger into the rectum to evaluate the firmness of its muscle tone (v. 1, p. 31).

(Dr. Wilkinson said doctors could **possibly** disagree regarding the patulousness of a rectum because some subjective criteria is involved (v. 1, pp. 26, 31-32). He acknowledged, however, that a nearly one inch wide rectal opening was large for a 7 year old child (v. 1, p. 27) and he could only speculate whether any looseness would have healed itself in the 5 months since Risa had been examined by Dr. Young (v. 1, p. 23, 32)).

benefits to be derived from the examination (v. 1, p. 23).[5]

The trial court ultimately denied Chard's motion for further examinations because the benefits to be obtained from further examinations were too speculative in nature: cross-examination of Risa could suffice to bring out any "puffing" on her part or "undue influence" on the part of the adults with whom she lived; and, the admittedly bright 7 year old child was articulate enough and otherwise capable of reporting any ongoing assaults, particularly since she was undergoing therapy in connection with allegations of sexual abuse (v.1, pp. 81-84, a copy of which is attached hereto as appendix A).

At trial, Chard denied having sexually assaulted Risa (v. 5, p. 658). He critiqued Dr. Young's method of measuring vaginal and rectal openings (v. 4, pp. 561-63) and he presented a psychologist/clinical professor of psychiatry to relate how marriage dissolutions, custody battles, and multiple interviews could undermine the reliability of a child's sexual assault allegations (v. 5, pp. 614-16).

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[5]Neither Dr. Wilkinson nor Dr. Young indicated that a further examination would not be traumatic to the child. Dr. Wilkinson did nothing other than acknowledge the absence of anything in Dr. Young's report indicating that Risa would be further traumatized by another examination (v. 1, p. 15) (This is not surprising, since Dr. Young's report did not even address the subject of future examinations (Defendant's Exhibit F)). And the portion of the record which Chard claims indicates Dr. Young's belief that no trauma would occur (*i.e.*, v. 1, p. 44) relates to his apprising the trial court of what **Suzanne Long** purportedly said in a prior deposition about the possible consequences of another **mental** examination. Because Chard had successfully objected to the prosecution's use of or reference to prior depositions, however, he was forced to admit he could not use or allude to those depositions either (v. 1, pp. 50-52).

The jury found him guilty as charged. On appeal, the Colorado Court of Appeals reversed. In its view, Risa should have been compelled to undergo further psychological and physical examinations because no evidence was presented she would be traumatized by further examinations and Chard was entitled, "as a matter of fundamental fairness, to corroborate or contradict the previous examinations performed without being limited to the expert witnesses selected by the mother and the prosecution." *People v. Chard*, 87CA1965 (Colo. Ct. App. Aug. 31, 1989) (not selected for official publication), pet. cert. app. 29a.

On certiorari review, the Colorado Supreme Court reversed the ruling of the Court of Appeals. It held, as Chard himself conceded (*see* portions of Chard's Colorado Supreme Court Brief, pp. 5-6, 9-10, reproduced here as appendix B), that psychological and physical examinations of child victims should not be ordered unless defendants demonstrate a compelling reason therefor; and, that whether a compelling reason exists is determined by balancing the possible intrusiveness of the examinations against the likelihood that they will produce material, as opposed to speculative, evidence. *People v. Chard*, 808 P.2d 351, 353, 356 (Colo. 1991), pet cert. app. 8a, 16-17a. The Supreme Court, however, failed to find any "compelling reason" for requiring further examinations: Chard's July 21, 1987 testimony undercut any need for another psychological examination; there was evidence in the record that a physical examination was frightening to children; and, "even if evidence of ongoing sexual abuse was found" in a second physical examination, such evidence "would be speculative" and "equivocal" in nature, since "it would not prove that the defendant did not sexually abuse [Risa] previously." *Chard*, 808 P.2d at 354, 356, pet. cert. app. 10a-11a, 17a-20a.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD BE DENIED

There is no reason for this Court to expend its scarce judicial resources reviewing the decision of the Colorado Supreme Court here: the facts are not as simple or as clear-cut as Chard says they are, *see* Statement of Case/Statement of Facts, *supra*; Chard was not unfairly surprised by the application of a new rule; and, most importantly, the case was fairly and correctly decided under a widely accepted analysis which is wholly consistent with Chard's federal constitutional rights.

Chard's initial complaint about the "establishment" of a "new rule of law" regarding court-ordered physical examinations lacks substance, because: (a) he himself argued for the adoption of this rule (*see* appendix B); (b) the rule was clearly foreseeable, its having been previously developed and applied in a number of Colorado cases in the analogous context of court-ordered mental examinations;[6] (c) the rule was consistent with that of those jurisdictions which had considered the issue as of the time of Chard's trial,[7] (d) the

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[6]*See People v. Estorga*, 200 Colo. 78, 612 P.2d 520, 523-24 (1980); *People v. Lucero*, 724 P.2d 1374, 1376 (Colo. Ct. App. 1986); *People v. McGhee*, 677 P.2d 419, 422-23 (Colo. Ct. App. 1983); *People v. Piro*, 671 P.2d 1341, 1342-43 (Colo. Ct. App. 1983); *People v. King*, 41 Colo. App. 177, 581 P.2d 739, 741 (1978).

[7]*See Lanton v. State*, 456 So. 2d 873, 873-74 (Ala. Ct. Crim. App. 1984); *People v. Nokes*, 183 Cal. App. 3d 468, 228 Cal. Rptr. 119, 123-27 (1986); *People v. Glover*, 49 Ill. 2d 78, 273 N.E. 2d 367, 370 (1971); *State v. Garrett*, 384 N.W. 2d 617, 618-19 (Minn. Ct. App. 1986).

It is also consistent with nearly every jurisdiction which has considered the issue since petitioner's trial. *See State v. Drab*, 546 So. 2d 54, 56 (Fla.

prosecutor argued the rule at the pretrial (July 21, 1987) hearing (cl. v. pp. 28-34; v. 1, pp. 72-78); (e) Chard was not surprised by the argument and responded to it (v. 1, pp. 4,6, 40-42, 78-79); and, (f) (as the Colorado Supreme Court found) the trial court considered the pertinent factors and exercised its discretion in a manner wholly consistent with the rule. *See Chard* 808 P.2d at 356 & 356 n. 1; pet. cert. app. 18a-19a. Under the circumstances, Chard cannot now claim he was somehow denied due process by the unfair, retroactive application on appeal of a "new" rule of law. *See Bouie v. City of Columbia*, 378 U.S. 347 (1964) (due process principles prohibit retrospective application only of completely unforeseeable decisions).

Chard's second claim is similarly without merit. Some jurisdictions recognize no constitutional right to compel a victim to submit to involuntary examinations.[8] A defendant in a criminal case has no general constitutional right of discovery. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). The right to confront adverse witnesses, including experts, is certainly not a constitutionally compelled rule of discovery. *Pennsylvania v. Ritchie*, 480 U.S. 39, 52 (1987). And the due process right to the disclosure of "material" evidence, *see Brady v. Maryland*, 373 U.S. 83 (1963), encompasses only evidence having an apparently significant exculpatory value, and not evidence which might only possibly be of use to the defense. *See California v. Trombetta*, 467 U.S. 479 (1984). *See also United States v. Bagley*, 473 U.S. 667, 682 (1985)

Ct. App. 1989); *State v. Hewett*, 93 N.C. App. 1, 376 S.E. 2d 467, 471 (1989); *State v. Ramos*, 553 A.2d 1059, 1062 (R.I. 1989).

[8]**See, e.g.** *State v. Gabrielson*, 464 N.W. 2d 434 (Iowa 1990) (psychiatric examination); *State ex. re. Wade v. Stephens*, 724 S.W. 2d 141 (Tex. Ct. App. 1987) (physical examination); *Gale v. State*, 792 P.2d 570, 574-77 (Wyo. 1990) (psychological examination).

("evidence is material only if there is a reasonable probability that, had [it] been disclosed to the defense, the result of the proceeding would have been different").

Unlike inanimate objects, children have dignity and privacy interests, *e.g.*, *State v. Hewett*, 93 N.C. App. 1, 376 S.E. 2d 467, 471 (1989), which are protected from unreasonable governmental intrusion by the fourth amendment to the federal constitution, *People v. Nokes*, 183 Cal. App. 3d 468, 228 Cal. Rptr. 119, 123-27 (1986), and which are not forfeited simply because they have previously been examined by individuals who ultimately testify on behalf of the prosecution. *Id.*; *Hewett*; *State v. Drab*, 546 So. 2d 54, 56 (Fla. Ct. App. 1989); *State v. Garrett*, 384 N.W. 2d 617, 618-19 (Minn. Ct. App. 1986). If these privacy interests were not protected from easy intrusion by criminal defendants, many child sex abuse crimes would go unreported or unprosecuted for fear that child sex abusers would subject their victims to further harassment, embarrassment, or shame. *See, e.g.*, *Pickens v. State*, 675 P.2d 665, 669 (Alaska Ct. App. 1984) (mental examinations); *State v. Gabrielson*, 464 N.W. 2d 434 (Iowa 1990) (same); *State v. Nelson*, 235 Neb. 15, 453 N.W. 2d 454, 486-87 (1990) (same); *Garrett* (physical examinations).

Assuming **arguendo** a defendant's due process rights extend to compelled examinations of alleged child victims of sexual assault, the Colorado Supreme Court's application of the widely accepted "compelling reason" test[9] adequately

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[9]*See* note 7, *supra*, for its application in physical examination cases; *see* note 6, *supra*, as well as, *e.g.*, *State v. LeBlanc*, 558 So. 2d 507 (Fla. Ct. App. 1990); *State v. Filson*, 101 Idaho 381, 613 P.2d 938, 942 (1982); *People v. Glover*, 49 Ill. 2d 78, 273 N.E. 2d 367, 370 (1971); *State v. Gregg*, 226 Kan. 481, 602 P.2d 85, 91 (1979); *State v. Nelson*, 235 Neb. 15, 453 N.W. 2d 454, 486-87 (1990); *Forbes v. State*, 559 S.W. 2d 318, 320

protected those rights. A defendant's due process rights are, after all, implicated only when access is denied to apparently exculpatory (and not just possibly useful) evidence. *Trombetta*. Requiring a defendant to show that apparently exculpatory evidence is likely to be found in further, presumptively intrusive examinations of a child does no violence to due process rights but does provide some protection to the privacy interests of children and to society's interest in effectively prosecuting child abuse crimes. *See* authorities cited in notes 6, 7, 9, *supra*. *See also Turner v. Commonwealth*, 767 S.W. 2d 557, 561-62 (Ky. 1989) (Wintersheimer, J., dissenting). Chard was not denied a fundamentally fair trial simply because he was required to show concrete and substantial justification for why his interests were paramount to those of the child victim for whom he sought court-ordered examinations.

CONCLUSION

Chard's petition for writ of certiorari should be denied.

Respectfully submitted,

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(Tenn. 1977); *State v. Miller*, 35 Wis. 2d 454, 151 N.W. 2d 157 (1967), for its application in mental examination cases.

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APPENDIX A

TRIAL COURT'S JULY 21, 1987 RULING

THE COURT: All right. Thank you, counsel. The Court has had a chance to review the affidavit now and the motion. And I note that there was a memorandum in support of your motion that was submitted originally and I think you cited basically the same cases that the People have cited, Mr. McCargar. And the Court, just as sort of a background here, would note that this is an emerging area of the law. The legislature has adopted a number of statutes with regards to these kinds of cases within the last half decade or thereabouts. This Court has received a good deal of testimony in other matters involving similar cases. And I think this Court, so that parties can understand the reason the Court has wrestled with this case as much as it has, would be something that the Court would take notice of that has not been presented in the evidence here but that where allegations of abuse have been found to be erroneous or unfounded among minor children, this Court has received in the course of seminars some good deal of information that that often times occurs almost a very substantial percentage. When there is a divorce involved and that leads some parties to question whether or not then there is undue influence by one of the parents over the children. That's why the court has wrestled with the problem here more

than it might otherwise have done so.

But this Court is not so convinced that the machinery of truth, as sometimes the trial process and the adversarial process is described, cannot function under these circumstances and that we must go to the outside and find "experts" to assist us. The Court makes mention of that because it occurs to this Court that if we start that practice then in every case, that is every kind of case, we may find ourselves moving into that area. I have not become so jaded, so to speak, with regards to our system to feel that that's necessary.

The Court makes those comments as a preamble to what is going to conclude in this case because this Court has an abiding belief that when properly presented, the jury system and the system that we have devised for justice here functions very well. And that indeed the issues that are raised by these motions are issues that can be addressed in a properly presented trial and in the course of the examination of even a seven year old child. And for that reason, the Court then is going to deny the motions of the defendant.

The Court is not unsympathetic to the motions in the sense that there is a presumption of innocence and that in these kinds of cases these are most serious allegations. But at the same time, this Court does not feel that the victim or the witness in this case is any different than the witness or

victims in any other kind of case, and it is a rare case indeed that this Court in fact does not find a single cited case in the memorandums of either party where physical examinations, for example, of the complaining witness have been granted.

The Court then with regards to the physical examination, I would first of all note that it has received testimony from Dr. Wilkinson indicating the nature of such an examination and the possible benefits that could be derived. The benefits, in this Court's opinion, are not so pressing or persuasive as to require this Court to grant the motion. At best, the only thing, and assuming that Dr. Wilkinson is correct, that these are not almost all subjective determinations that could be determined by a physical examination is that the -- that the assaults presumably have ceased. But we are dealing here with a seven year old child. That child, obviously, from the testimony presented by the defendant even is a bright, articulate child. This Court cannot believe that that child could be so petrified as to be unable to report ongoing assaults at this point in her life, and in light of the fact that she apparently is now in some kind of therapy.

So this Court feels that the -- the benefits that could possibly be derived from another physical examination are one, speculative, and two, simply this Court does not believe that they would in fact show anything beneficial that could conceivably be presented at the time of the trial in this case.

Further, the Court is satisfied that upon cross-examination, properly conducted appropriate inquiry into this area could be made. And if, indeed, some third party has been perpetrating assaults on this child, this child presumably is articulate enough to let everyone know that. So, that motion would be denied.

Then with regards to the matter of the emotional examination of the child. The court again would deny that motion. This Court is satisfied that the child is such -- at such an age that if the child is allowed to testify here that appropriate cross-examination of the child properly conducted would certainly bring out the fact of any undue influence by the natural mother. And in addition -- or any other third party. And in addition, that any proper examination would reflect any -- the court will use the term that it recalls from its civil practice and that is, puffing on the part of the child could certainly be brought to the attention of the jury. They are the fact finders here. And, counsel, as this Court has indicated, it has an abiding faith in their ability to draw the proper conclusions in a properly presented case. The Court would further note that counsel for the defendant is certainly competent to conduct such an examination. So for those reasons, the motion would be denied.

(v. 1, pp. 81-84).

APPENDIX B

PORTIONS OF CHARD'S SUPREME COURT BRIEF

SUMMARY OF THE ARGUMENT

The legal issue before this Court is to set forth a legal standard to establish under what circumstances a trial court should order physical or psychological examinations where the complaining witness is a child in a criminal matter charging a sexual offense. Mr. Chard argues that the District Court should apply a test balancing the possible emotional trauma, embarrassment or intimidation to the examinee against the likelihood of producing material evidence. The trial court abused its discretion in denying Mr. Chard's Motion when it failed to properly apply this balancing test.

ARGUMENT

In applying the above referenced balancing test, the Court must attempt to reconcile its duty to protect the dignity of the witness sought to be examined while insuring a criminal defendant's ability to zealously defend himself by being able to discover relevant evidence.

(Brief at 5-6).

....

> It is within the discretion of the trial court to determine whether to order a psychological examination of a child molestation victim. *People v. King,* 581 P.2d 739 (Colo. App. 1978). An examination should be ordered only when there exists a compelling reason for the examination and when the Court has balanced the "possible emotional trauma, embarrassment or intimidation to the complainant against the likelihood of the examination producing material as distinguished from speculative, evidence". *King, supra* at 741 citing *People v. Neely,* 228 Cal. App. 2d 26, 39 Cal. Rptr. 251 (1964). The Court in denying Defendant's Motion for Physical and Mental Examination of Alleged Victim failed to properly apply the appropriate balancing test as set forth in *King.*

(Brief at 9-10).

....